of abject poverty albeit with awareness of a possibly very much bigger but possibly very much delayed claim at common law.

Having said so, it would be the bounden duty of the Court to allow a set-off of the said sum of $14,000/- against damages to be awarded, provided that such a set-off has been pleaded. Obviously it has not been pleaded expressly by the 4th defendant, but the very reliance on the payment of the sum of $14,000/- for excluding liability against the 4th defendant, is sufficient in my view, though somewhat tenously, to imply and include such a plan of set-off.

The Court therefore makes the following orders:-

(1) Judgment with costs against all defendants for $60,000/- inclusive of interest, being agreed damages;

(2) this Court doth declare that the 4th defendant be at liberty to set off the sum of $14,000/- against the said damages, and

(3) the apportionment of such damages among the said widow and the said minor children is to be dealt with later on a summons-in-chambers.

Claim allowed.

Solicitors: *Khoo & Sidhu; R.K. Nathan & Co.*

THE "YIH SHEN" M.V. "YIH SHEN," OWNERS OF CARGO ON v. M.V. "YIH SHEN," OWNERS OF

[O.C.J. (Edgar Joseph Jr. J.) September 13, 1984]
[Penang – Admiralty In Rem No. 2 of 1984]

Shipping law – Admiralty action in rem – Breach of contract of carriage – Arrest of ships – Damages – Intervener claiming interest – Ex parte orders in favour of Intervener – Serious question to be tried – Real prospect of success at trial – Interest in cargo – Whether ex parte orders shall be vacated – R.H.C. 1980, O.41 r. 12.

In this case, the plaintiffs as owners of the cargo laden on board the ship "Yih Shen" sued the owners of the ship, the defendants, claiming damages for breach of a contract of carriage. The ship was arrested on application of the plaintiffs. On February 1, 1984, the charterers of the ship entered a caveat. The defendants put the plaintiffs to strict proof that they were the owners of the cargo, claiming that the plaintiffs were in breach of the contract because of default of certain payment. At this point of time, the Intervener applied for leave to intervene as beneficial owner of the ship "Yih Shen". In a separate *ex parte* application, the intervener applied for a stay of the orders of court dated February 13, 1984 which enabled the plaintiffs to transfer the cargo on the "Yih Shen" to the ship "Vitya Komenco" and for an interim injunction restraining the plaintiffs from doing so. In the event the injunction and consequential orders ("the *Ex Parte* Orders") were granted in favour of the Intervener. The plaintiffs then made the present application to set aside the *Ex Parte* Orders.

Held: (1) the Intervener has not demonstrated that there is a serious question to be tried or that he has a real prospect of success at the trial of establishing his claim to the ownership of the ship "Yih Shen";

(2) the *Ex Parte* Orders and the order granting leave to intervene were vacated, as the Intervener had not established a sufficient interest in the cargo;

(3) the Intervener must pay the costs of the plaintiffs and the defendants, and the usual enquiry as to damages was ordered.

Cases referred to:

(1) *Macaura* v. *Northern Assurance Co. & Ors.* [1925] A.C. 619, 633.
(2) *The Aventicum* [1978] 1 LI.L.R. 184.
(3) *Eng Mee Yong & Ors* v. *Letchumanan* [1979] 2 M.L.J. 212, 217, Col. 2 F.
(4) *Re Young Manufacturing Co. Ltd.* [1900] 2 Ch. 753.
(5) *American Cyanamid* v. *Ethicon* [1975] A.C. 396, 407.
(6) *Pegang Mining Co. Ltd.* v. *Choong Sam & Ors.* [1969] 2 M.L.J. 52, P.C.

SUMMONS-IN-CHAMBERS.

N.T. Vello for the plaintiffs.

R.J. Manecksha for the defendants.

Peter Dason for the Intervener.

K.S. Choo for the Caveator.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: This was an application by way of Summons-in-Chambers (En. 32) by the Plaintiffs herein, supported by affidavit, praying for dissolution of an *ex parte* interlocutory injunction and orders consequential thereto made by this Court on February 24, 1984 (En. 26) ("the *Ex Parte* Orders") in favour of one Cherry Chow ("the Intervener").

In order to understand this application, it is necessary to set out, briefly, the history of the proceedings out of which it arose.

The Plaintiffs herein as owners of the cargo laden on board the ship "YIH SHEN" of the Port of Panama caused to be issued a Writ of Summons dated January 31, 1984 claiming against the owners of the ship, the Defendants herein, damages for breach of a contract of carriage of the cargo from Rangoon to Bangkok in or about the months December 1983 to January 1984.

Upon the undertaking of the Plaintiffs' solicitors, and upon their application supported by the affidavit of Mr. N.T. Vello, their counsel, affirmed to on January 31, 1984 (En.3), and the affidavit of one Kamolmath, managing director of Messrs. T.C.K. Sawmill Co., Ltd. of Bangkok, affirmed to on February 9, 1984 (En.60), the ship was duly arrested and an Order made on February 13, 1984 (En.21) for immediate trans-shipment of the cargo lying in the "Yih Shen" onto another ship the "Vitya Khomenco" to facilitate delivery of the same at Bangkok where it was said they were urgently needed.

On or about February 1, 1984, Messrs. K.S. Choo & Co., Advocates & Solicitors, Penang, as solicitors for Messrs. Jaya Hemaco Steamship (H.K.) of 54, Tin Hau Temple Road, 2nd Floor, Hong Kong, who claimed to be charterers of the ship "Yih Shen", entered a caveat (En.9) against the issue of a release with respect to the ship and, should it be sold, by an Order of Court, a caveat against payment out of the proceeds of sale.

It is unnecessary to set out particulars of the Defence & Counterclaim but the gist of it was that the Plaintiffs were put to strict proof that they were the owners of the cargo, alternatively, if they were, the Defendants denied that they were in breach of the contract of carriage. They further said that it was the Plaintiffs who were in breach because they had defaulted in making payment of a certain sum towards outstanding freight charges, mostly to be utilized to supply bunkers in Penang.

It was at this point of time that the Intervener, through his solicitors, Messrs. Dason & Co., applied for leave to intervene as beneficial owner of the ship "Yih Shen" (En.24). His affidavit affirmed to on February 24, 1984 (En.22) filed in support of his application exhibited photostatic copies of what purported and were alleged by him to be:

(a) a Fixture Note (Exh: CC2), executed by him for, what he claimed, was his company "Yih Shen Marine S.A." and by the charterers who were named as "Jaya Hemaco Steamship";

(b) A Bill of Sale (Exh: CC3), executed by him for acceptance of the sale of "the Orient Tropy" to his company by Orient Sapphire Shipping Co. S.A. together;

(c) A set of documents (Exh: CC3) showing the change of name of the ship from "the Orient Tropy" to the "Yih Shen" executed by him (with the observation "and such sale will be effected should the form be completed.").

He accordingly made the humble plea for "the protection of my interests and lien on the said cargoes on my said ship and for the Honourable Court to preserve them as they are issues relevant to this action."

He also prayed, in a separate *ex parte* application (En.25), for a stay of the Orders of the Court dated February 13, 1984 (En.21) which, it will be recalled, enabled the Plaintiffs to transfer the cargo on the "Yih Shen" to the ship "Vitya Komenco" and for an interim injunction restraining the Plaintiffs, their servants or agents from doing so.

In the event, the *Ex Parte* Orders referred to in the opening paragraph of this judgment were duly made.

That concludes the brief history of the proceedings which led to the Plaintiffs applying for dissolution of the *Ex Parte* Orders and I now turn to consider the merits of that application (En.32) which is supported by the affidavit of Mr. N.T. Vello, counsel for the Plaintiffs, affirmed to on February 19, 1984 (En.31).

In his affidavit, Mr. Vello has deposed that the Intervener's claim to beneficial ownership of the ship "Yih Shen" was both incorrect and misleading as the registered beneficial owners were at all times a body corporate named "YIH SHEN MARINE S.A.".

In support, Mr. Vello refers to Exh' N.T.V. 1 being, a photostatic copy of a telex dated January 30, 1984 from Messrs: Quijano & Associates, lawyers in the Republic of Panama, addressed to him. That telex reads:

"WE REFER TO YOUR TELEX OF TODAY AND ARE PLEASED TO CONFIRM THAT THE ABOVE VESSEL IS

PRESENTLY REGISTERED AS PROPERTY OF YIH SHEN MARINE S.A. THE VESSEL IS PRESENTLY FREE FROM REGISTERED ENCUMBRANCES THOUGH ACCORDING TO SECNAVES VESSEL'S 1984 TAXES ARE STILL OUTSTANDING. SURCHARGE AND INTEREST ON THESE PAYMENTS WILL ACCRUE AS AT FEBRUARY 1ST, 1984."

Mr. Vello also refers to an affidavit affirmed to by Mr. K.S. Choo, Advocate & Solicitor, Penang, on January 31, 1984 in Penang High Court Admiralty in Rem 1/84 (which is a connected suit) which in turn refers to information provided by another firm in Panama, stating that "Yih Shen Marine S.A." were at the material time the beneficial owners of the ship "Yih Shen".

Mr. Vello next refers to Exh: N.T.V. 3 being, a photostatic copy of a telex dated January 25, 1984 from Messrs. Hwang and Associates of Taipei, Taiwan, solicitors for "Yih Shen Marine S.A.", stating that the Intervener is or was the Secretary of "Yih Shen Marine S.A.". That telex reads as follows:

"THIS IS HUANG N ASSOCIATES IN TAIPEI. WE HV BEEN ADVISED BY ZAIN N CO THAT U HV CONSENTED TO ACT FOR US IN THE ABOVE-CAPTIONED MATTER, FOR WHICH WE ARE MOST GRATEFUL. NOW, CONCERNING THE MATTER, WE WUD BRIEFLY ADV AS FOLLOWS:

A CERTAIN MR CHARRY CHOW, SECRETARY OF YIH SHENG MARINE SA (THIS COMPANY IS OUR CLIENT), CHARTERED THE VSL "YIH SHEN" OWNED BY OUR CLIENT TO JAYA HEMACO STEAMSHIP (HONG KONG) CO. WITHOUT DUE AUTHORIZATION FM OUR CLIENT. RIGHT NOW, THE VSL IS BERTHED AT THE PORT OF PENANG.

OUR CLIENT WUD APPRECIATE IT IF ANY PREVENTIVE MEASURE WL BE TAKEN AT YR END TO STOP THE VSL FM LEAVING THE PORT. IF A P/A IS REQUIRED FOR THIS PURPOSE, PLS TLX THE FORM TO US. PLS DO NOT HESITATE TO CONTACT US SHOULD U REQUIRE FURTHER INFORMATION."

Mr. Vello refers to yet another telex, also from Messrs. Hwang and Associates, addressed to the Defendants' Solicitors, Messrs. Lim Kean Siew & Co., being Exh: N.T.V. 4, stating that Yih Shen Marine S.A. are making application to the Panamanian authorities to de-register the Intervener from the Company's register as Director and Secretary. That telex reads as follows:

"WE HAVE RELAYED THE MESSAGE TO CLIENTS. CONCERNING POINT 2 O UR TLX, CLIENTS INFORMED US THAT THEY HAVE ALREADY PURCHASED THE AIR TICKETS ON MALAYSIAN AIRLINER, FLIGHT NO. MH012, DEPARTING 11:15 FEB 14. AS TO THE OTHER POINTS, WE SHALL REVERT TO U ONCE WE HAVE OBTAINED OUR CLIENTS' REPLIES.

MEANWHILE, MR. CHARRY CHOU HAS LEFT TAIWAN AGAIN. WE DON'T KNOW WHETHER HIS DESTINATION IS PENANG OR NOT. IN ANY EVENT, PLS BE ADVISED THAT CLIENTS ARE NOW MAKING APPLICATION WITH PANAMANIAN GOVERNMENT AUTHORITIES FOR CHANGING THE REGISTRATION WHICH RECORDS MR CHOW AS DIRECTOR AND SECRETARY OF THE COMPANY. PLS THEREFORE DISREGARD ANY INSTRUCTIONS WHICH MIGHT COME FROM MR CHOW."

Mr. Vello then referred to certain admissions made by the Intervener in his affidavit affirmed to on February 24, 1984 (En.22) in support of the application for the interlocutory injunction.

Specifically, in paragraph 4 of En. 22, the Intervener himself admits that the Fixture Note concerned was signed by him for and on behalf of the ship's owners, Messrs. Yih Shen Marine S.A. The Fixture Note being an agreement between the owners of the ship and a charterer named Messrs. Teakhouse of Rangoon, Burma and, in it, the Intervener acknowledges that the ship's owners are Messrs. Yih Shen Marine S.A.

Again, in paragraph 5 of En. 22, the Intervener himself admits that the Bill of Sale was executed by him for the acceptance of the sale to his company.

In reply, Mr. Peter Dason, on behalf of the Intervener, affirmed an affidavit on March 7, 1984 (En.34) and produced a document (Exh: PD1), being a Xerox copy of what purported to be "a testimonial" of a Notary Public in Panama, stating as follows:

"To the best of may knowledge, information and belief I hereby certify that Chow Ching Yee also known as Cherry Chow is the beneficial owner of all the paid up share capital of the incorporation known as Yih Shen Marine S.A. which is the registered owner of the motor vessel known as Yih Shen registered in the Republic of Panama.

I also certify that the other directors of the incorporation are nominated for the purpose of registration and that in fact they hold their shares whatsoever in the incorporation as Mr Chow Ching Yee's nominees. As a result, Mr Chow Ching Yee also known as Cherry Chow is the only beneficial owner of the motor vessel Yih Shen."

When the application (En.32) first came up

before me in Chambers on March 1, 1984, Mr. Dason and Mr. Manecksha applied for an adjournment on the ground that they had only just been served with copies of the application. I accordingly granted an adjournment over the objections of Mr. Vello and refixed the application for hearing on March 8, 1984 in Open Court as I foresaw that the application was likely to take some time.

On that day, however, when the matter came up before me in Open Court, Mr. Dason for the Intervener, again applied for a postponement as his client, who he said was in Taipei, was having visa problems as a result of which his entry to Malaysia was delayed.

Mr. Vello objected as the matter had been pending for a long time but Mr. Manecksha did not. Similarly, Mr. Choo, for the Caveator, and counsel for Plaintiff in Admiralty in Rem 1/84, a connected suit, also had no objection.

Later, however, Mr. Vello withdrew his objection and I adjourned the application to March 26, 1984 as I required the Intervener to attend Court to give oral evidence in support of his claim that he was the beneficial owner of the ship and therefore had an interest in it sufficient to justify the making of the *Ex Parte* Orders in which event he would be subject to cross-examination upon his affidavit (En.22). This date was, however, later put back to April 12, 1984 because March 26, 1984 was not convenient to the Court, that being the date of the opening of the New Judicial Complex in Kuala Lumpur which all Judges were required to attend.

When the application came on for hearing on April 12, 1984, Mr. Dason was again constrained to apply for an adjournment on the ground that the Intervener was still in Taipei. Mr. Dason explained that on April 10, 1984 he had received a telegram from his client stating that he was prevented from attending Court because of another lawsuit in Taipei but could attend the High Court, Penang, in two weeks' time.

On enquiry as to what the lawsuit in Taipei was about, Mr. Dason said that according to one Mr. L.P. Leong (who was present in Court), a representative of the Intervener, the suit was about the ownership of the Yih Shen, the parties thereto being the Intervener and the Defendants herein.

Mr. Dason stated that he had received another telegram on April 12, 1984 from his clients' lawyers in Taipei explaining his clients' inability to attend because of the lawsuit. Mr. Dason confirmed that his client had been duly notified of the new date of hearing on the telephone by one Mr. Leong but, as the connection was a bad one, he was not sure whether the Intervener had said that he would be able to attend Court on April 12, 1984. The Intervener also said during this telephonic conversation that he was engaged in another lawsuit in Taipei and would be able to attend a hearing in Penang upon its conclusion.

Mr. Manecksha for the Defendants stated that he had no knowledge of any suit in Taipei but left the matter to the Court. Mr. Vello objected to the application for a further adjournment.

In the end, I reluctantly gave an adjournment pointing out that the new date of hearing would be a peremptory one and no request for a further adjournment by the Intervener would be entertained. I also ordered costs thrown away by reason of the adjournment to be paid by the Intervener to Plaintiffs and Defendants.

In any event, on June 4, 1984, when the application came up before me for hearing, Mr. Dason once again rose to his feet and made yet another application for an adjournment on the ground that the Intervener was still in Taiwan and, since the last hearing date, he had received a telex dated May 29, 1984 confirming this. I refused the adjournment and directed the case to proceed.

At the conclusion of the arguments, I vacated the *Ex Parte* Orders because I was satisfied upon the evidence before me that the Intervener was not the beneficial owner of the ship Yih Shen and therefore had no interest in the cargo on board it.

In the first place, according to "the testimonial" of the Notary Public, Mr. Sun Kuen Ho (Exh: PD1), annexed to En. 34, being the affidavit of Mr. Peter Dason dated March 7, 1984, which I had earlier reproduced, it is clear that the ship is registered in the name of the Yih Shen Marine S.A. and what the Intervener is alleging is that as he is the beneficial owner of all the paid up share capital in this company he was and is, by virtue of that fact, the only beneficial owner of the ship.

This is, of course, a misconception in Law. No shareholder in a company has any right to any item of property owned by the company for he has no legal or equitable interest therein. All he is entitled to is a share in the profits while the company

continues to carry on business and a share in the distribution of the surplus assets when the company is wound up. Indeed, as Lord Wrenbury said in *Macaura* v. *Northern Assurance Co. & Ors.*[1] :

"...the corporator even if he holds all the shares is not the corporation, and that neither he nor any creditor of the company has any property legal or equitable in the assets of the corporation."

On this ground alone, the *Ex Parte* Orders must be vacated but, on a further and alternative ground also, the Applicants are entitled to succeed.

If, contrary to my primary opinion, it is right and proper for this Court to pierce the corporate veil in order to determine who the beneficial owner of the Yih Shen is, and this would appear to be supported by *The Aventicum*[2], then I consider I should state what my findings were on this question.

The Intervener had alleged that the company was registered as owners purely as nominess, in other words, that it held the ship as a trustee for him.

I recognised that on this question whether there was a trust, all the Intervener had to establish, at this stage of the proceedings, was that there was a serious question to be tried. Ordinarily, his affidavits alone, if they had *prima facie* plausibility to merit further investigation as to the alleged trust, would have sufficed for this purpose : *Eng Mee & Ors.* v. *Letchumanan*[3].

Accordingly, had it been necessary to take into consideration the Intervener's three affidavits (Enclosures 32, 46 & 47), I would have done so, regard being had to the principle in *Eng Mee's case.* In my opinion, however, for reasons which I shall presently state, there was no necessity to take into consideration these affidavits.

This makes it necessary for me to recount, once again, the events of April 12, 1984, the peremptory date of hearing, when it will be recalled, for the third successive time the Intervener had failed to attend Court with no credible excuse for absence. On the two earlier occasions postponements had been granted for the express purpose of enabling him to give oral evidence in support of his claim and, consequently, to be cross-examined upon his affidavits alleging a trust. I therefore felt justified in disregarding his affidavits.

I need hardly say that without his affidavits aforesaid there was not a scrap of evidence to show a trust and, of course, no serious question to be tried in relation thereto.

I would, however add, that even had I taken into consideration the Intervener's three affidavits, it would have made no difference to my decision, in view of the infirmities in his case, the undisputed contemporary documents and the probabilities of the case to which I shall presently refer.

The Intervener's claim to a trust suffers from at least four obvious defects which may be stated, broadly, thus:

First, bearing in mind that the alleged trustee in this case was a corporation and that the subject-matter of the alleged trust was a ship, I would have expected some form of documentation, for example, a directors' resolution or a deed or other document confirming the trust. Instead, the only evidence of the alleged trust was the Intervener's bare assertion. This, I considered inherently improbable in itself, although proof of a trust by parol evidence is admissible in Law: (*Lewin's* Law of Trust, 11th ed. page 183).

Secondly, the claim to a trust is also inconsistent with the undisputed contemporary documents and admissions particularised in Mr. Vello's affidavit of February 19, 1984 (En.31) to which I have already referred.

Thirdly, I did not consider that paragraph two of the testimonial of the Notary Public Panama, which I have reproduced earlier on in this judgment, nor a similar unsworn statement of a Notary Public in Hong Kong, annexed to the Intervener's affidavit of April 19, 1984 (affirmed in Taiwan contrary to 0.41 r.12 of the *Rules of the High Court, 1980*), of any assistance to the Intervener, since neither Notary Public had personal knowledge of the alleged trust nor have they cared to disclose the sources of their knowledge, information or belief as regards it, with the result that they are inadmissible in Law: *Re Young Manufacturing Co., Ltd.*[4].

Fourthly, the Bill of Sale being Exh: B, annexed to the Intervener's own affidavit (En.46), contains an acknowledgment by the Transferors that the consideration for the purchase was paid to them not by the Intervener but by Yih Shen Marine, S.A.

It was for the foregoing reasons that I was amply satisfied that the statements contained in the Intervener's affidavits as to the alleged trust aforesaid did not have sufficient *prima facie* plausibility to merit further investigation as to their truth.

Summing up, I posed to myself and answered. the following questions suggested in the oft-quoted case of *American Cyanamid* v. *Ethicon*[5]:

(a) Has the Intervener demonstrated that there is a serious question to be tried?

Answer : No.

(b) Has the Intervener demonstrated that he has a real prospect of success at the trial of establishing his claim to the ownership of the ship "Yih Shen"?

Answer : No.

In view of the answers to the above questions, I did not consider the further questions as to the adequacy of damages for any loss suffered by the Intervener or the adequacy of the undertaking given by the Intervener in the event of any loss suffered by the Plaintiffs or where the balance of convenience lay.

But, had it been necessary to consider the adequacy of the undertaking given by the Intervener, I would, on review, have regarded it as totally inadequate, as he had proved himself to be a most elusive foreigner.

Accordingly, I vacated the *Ex Parte* Orders on the ground that the Intervener had not established a sufficient interest in the cargo, and ordered the usual enquiry as to damages. I was also satisfied, in consequence, that he had no sufficient *locus standi* to intervene, regard being had to the principles enunciated in the case of *Pegang Mining Co., Ltd.* v. *Choong Sam & Ors.*[6]. I therefore made a further order, vacating the Order granting leave to intervene, in order to satisfy the insistent demand for justice.

Lastly, I ordered the Intervener to pay the costs of the application to the Plaintiffs and the Defendants.

Solicitors: *Chang & Vello; Lim Kean Siew & Co.; Dason & Co.; K.S. Choo & Co.*

Order accordingly.

QUAH BAN POH v. DRAGON GARDEN PTE. LTD.

[O.C.J. (Gunn Chit Tuan J.) September 15 to 19, 1984 and December 14, 1984, January 19, 1985]

[Johor Bahru – Civil Suit No. 73 of 1977]

Contract law – Agreement for sale and purchase of house – Time the essence of contract – Uncompleted works to house – Payment under protest – Termination of agreement – Waiver – Specific performance – Damages – Counterclaim for mesne profit.

By a written agreement dated July 20, 1974 the plaintiff purchased from the defendant a double-storey house for $38,500. The defendant was to complete the house on or before December 31, 1975. Time was the essence of the contract relating to payment of money. On November 28, 1975, the plaintiff received a letter from a firm of solicitors representing both parties asking him to take possession of the house and pay the final instalment of $3,850, within a given period. Between that date and April 10, 1976, the plaintiff inspected the house twice and found it not completed and letters were exchanged between the parties. On April 10, 1976, the defendant wrote to the plaintiff informing him that the uncompleted works had been fully remedied and requesting payment of the last instalment of $3,850 or otherwise it would terminate the said agreement. On May 13 the plaintiff sent a cheque for $3,850 to the solicitors paying under protest, and the said solicitors returned the cheque to the plaintiff without the defendant's instructions. On May 18, 1976, the plaintiff and the defendant's architect jointly inspected the house and the latter wrote to the defendant on May 29, 1976 requesting it to remedy the defects and uncompleted works. On September 17, 1976, the defendant wrote to the plaintiff to take over the house and pay the balance of $3,850 immediately. The plaintiff got the keys of the house on September 22, 1976. On October 6, 1976 the said solicitors instructed by the defendant requested the plaintiff to pay immediately the sum of $4,295.96 being last instalment plus interest. But on October 13, 1976 the defendant wrote to their solicitors again instructing them to terminate the said agreement. As instructed by the defendants, the solicitors wrote a letter on October 16, 1976 to the plaintiff to terminate the said agreement forthwith. The plaintiff was asked to deliver vacant possession of the house. On October 20, 1976, the solicitors sent to the plaintiff the defendant's cheque for $26,950 being refund of the monies less sum forfeited. The plaintiff did not pay the cheque into his account and considered the agreement not terminated and still claimed that the defendant had failed to rectify the defects which he was compelled to rectify. He sent to the defendant a cheque for $1,556.85, being the balance less the estimated cost of repairs of $2,293.15. Eventually on February 2, 1977, the plaintiff sued the defendant for damages for breach of contract and for delivery of the relevant issue document of title. The defendant counterclaimed for mesne profit at $800 per month.

Held: (1) the payment of the last instalment of $3,850 by the plaintiff was a tender of the said sum under protest and was therefore a good and valid tender;

(2) the defendant had waived and allowed time of payment of the last instalment to pass. If the defendant had wanted to make time again of the essence of the contract,